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# Guardianship: A Civil Rights Perspective

By Sheila E. Shea and Carol Pressman

## Introduction

A person's right to determine the course of his or her life is a fundamental value in American law and firmly embodied in New York State jurisprudence.<sup>1</sup> Guardianship is the legal means by which a court appoints a third party, most typically an individual, but in other cases a not-for-profit corporation or government official, to make some or all decisions on behalf of a person determined unable to manage his or her own affairs.<sup>2</sup> Guardianship can be an important protective device, forestalling personal harm, financial exploitation, and other affronts to the dignity and welfare of people who are alleged to lack decisional capacity.<sup>3</sup> The civil liberties of the person subjected to guardianship yield in the process, however, exacting a personal and societal cost that warrants further exploration and consideration.<sup>4</sup>

This article weaves historical context and modern disability theory together to highlight the principle that less restrictive alternatives must be considered before a guardianship is imposed upon any person. Stakeholders in

New York are urging modernization of our guardianship statutes at the same time the American Bar Association has resolved that legislatures and courts recognize supported decision-making as a less restrictive alternative before guardianship is imposed. The article closes with an admonition that guardianships should be considered dynamic, rather than static, in nature. Restoration of rights is required when the person subject to the regimen no longer benefits from its boundaries. Guardianship from a civil rights perspective shatters conventional beliefs about surrogacy and is offered for the benefit of people with disabilities who wish to define their own futures.

## Guardianship and American Law

Guardianship has been employed since Ancient Rome to protect people who are unable to manage their personal and financial affairs because of incapacity by removing their right to make decisions and transferring legal power to another person, the guardian.<sup>5</sup> Guardianship is a matter of state law. Before a guardian may be appointed, an indi-

vidual must be determined to be an incapacitated person, defined in various ways, but codified in uniform acts as: an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.<sup>6</sup>

In most states, a single guardianship statute applies to all populations, regardless of the alleged cause of the person's incapacity. New York is one of six states, the others being California, Connecticut, Idaho, Kentucky and Michigan,<sup>7</sup> that have a separate statute that may

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be invoked for people with developmental disabilities. Guardianships may be plenary in nature, divesting all autonomy from the person subject to the regimen, or tailored to the individual needs of the person found to lack capacity.<sup>8</sup> Although virtually all state statutes have an explicit preference for limited guardianships, the empirical evidence that is available suggests that most guardians appointed by courts are authorized to exercise total or plenary authority over the affairs of the person determined to be incapacitated.<sup>9</sup>

A lack of clarity persists concerning the actual number of people who may have guardians appointed for them in the United States. Estimates range from less than 1 million to more than 3 million, but the number will likely increase significantly with the aging of the "baby boomers,"<sup>10</sup> as well as the prevalence of dementia in the population.<sup>11</sup>

### Guardianship and Civil Rights

Given its ancient origins, guardianship laws predate not only modern civil rights laws, such as the Americans with Disabilities Act,<sup>12</sup> but also precede the U.S. Constitution and the Magna Carta.<sup>13</sup> Often examined through the lens of benevolence, the appointment of a guardian divests autonomy from another person and has severe civil rights implications. As stated in 1987 by the House of Representatives Special Committee on Aging:

By appointing a guardian, the court entrusts to someone else the power to choose where [he/she] will live,

what medical treatment [he/she] will get and, in rare cases, when [he/she] will die. It is in one short sentence, the most punitive civil penalty that can be levied against an American citizen . . .<sup>14</sup>

The "civil death" characterization of guardianship arises because a person subjected to it loses autonomy over matters related to his or her person and property. Indeed, in many jurisdictions a person with a legal guardian will be deprived of fundamental rights, such as the right to vote, marry and freely associate with others.<sup>15</sup>

A powerful counter voice to guardianship as civil death is the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol.<sup>16</sup> Adopted in 2006, the CRPD is the first international human rights treaty drafted specifically to protect the rights of people with disabilities.<sup>17</sup> Legal scholars argue that the CRPD will provide the impetus for reshaping guardianship laws in the United States as "CRPD dictates supported – as opposed to substituted – decision making."<sup>18</sup> Whereas guardianships involve a third party making decisions for the individual subject to the regimen, supported decision-making focuses on supporting the individuals' own decisions. As stated by the American Bar Association:

Supported decision-making constitutes an important new resource or tool to promote and ensure the constitutional requirement of the least restrictive alternative. As a practical matter, supported decision-making builds on the understanding that no one, however abled, makes decisions in a vacuum or without the input of other persons whether the issue is what kind of car to buy, which medical treatment to select, or who to marry, a person inevitably consults friends, family, coworkers, experts, or others before making a decision. Supported decision making recognizes that older persons, persons with cognitive limitations and persons with intellectual disability will also make decisions with the assistance of others although the kinds of assistance necessary may vary or be greater than those used by persons without disabilities.<sup>19</sup>

One form of assistance is the "Supported Decision-Making Agreement" by which the person with a disability chooses individuals to support him or her in various areas, such as finances, health care, and employment. In turn, "supporters" agree to assist the person in his or her decisions, rather than substituting their own. Supported decision-making agreements are used in pilot projects around the world and in at least one state, Texas, which enacted its own Supported Decision-Making Agreement Act.<sup>20</sup> In New York, it can be expected that recommendations for legislation will emerge as a result of a five-year pilot funded by the Developmental Disabilities Planning Council. The Council has issued a grant to a consortium of faculty members from Hunter College/City University of New York, among others, to study supported decision making as an alternative to guardianship in New York.<sup>21</sup>

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## Guardianship in New York

The general adult guardianship statute in New York is codified at Article 81 of the Mental Hygiene Law (MHL). The stated purpose of Article 81 is to:

[S]atisfy either personal or property management needs of an incapacitated person in a manner tailored to the individual needs of that person, which takes in account the personal wishes, preferences and desires of the person, and which affords the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life.<sup>22</sup>

A discrete statute exists, however, that may be invoked for people alleged to be in need of a guardian by reason of an intellectual or other developmental disability. In contrast, that statute, codified at Article 17-A of the Surrogate's Court Procedure Act (SCPA), is a plenary statute the purpose of which at its inception in 1969 was largely to permit parents to exercise continued control over the affairs of their adult children with disabilities.<sup>23</sup> In essence, the statute rested upon a widely embraced assumption that "mentally retarded"<sup>24</sup> people were perpetual children.<sup>25</sup> Under New York law, a person with developmental disabilities can be subject to either guardianship statute, despite the considerable substantive and procedural variations between Article 81 and Article 17-A.<sup>26</sup> A conundrum arises, as a result, because a petitioner for guardianship can choose between two statutes and petitioner's choice will determine the due process protections to be afforded to a respondent with developmental disabilities.

### Article 81 of the Mental Hygiene Law

Article 81 of the MHL, proceedings for appointment of a guardian for personal needs or property management, became effective on April 1, 1993.<sup>27</sup> Article 81 replaced the former dual structure conservatorship and committee statutes that operated in New York.<sup>28</sup> By way of history, the appointment of a committee, pursuant to former Article 78 of the MHL, was the only available legal remedy to address the affairs of a person alleged to be incompetent. However, the committee statute required a plenary adjudication of incompetence.<sup>29</sup> Because of the stigma and loss of civil rights accompanying such a finding, the judiciary became reluctant to adjudicate a person in need of a committee.<sup>30</sup> In 1972, the conservatorship statute (former Article 77 of the MHL) was enacted into law as a less restrictive alternative to the committee procedure.<sup>31</sup> Unlike the committee statute, the appointment of a conservator did not require a finding of incompetence. Rather, the former law authorized the appointment of a conservator of the property for a person who had not been:

[J]udicially declared incompetent and who by reason of advanced age, illness, infirmity, mental weakness, alcohol abuse, addiction to drugs or other cause suffered substantial impairment of his ability to care

for his property or has become unable to provide for himself or others dependent upon him for support.<sup>32</sup>

However, by design, the statute limited the power of the conservator to property and financial matters.<sup>33</sup> Chapter amendments to the MHL were enacted in 1974 attempting to expand the role of conservators. The first established a statutory preference for the appointment of a conservator.<sup>34</sup> A second chapter amendment authorized conservators to assume a limited role over the personal needs of the person who was the subject of the proceeding.<sup>35</sup> Cast as reform measures, the amendments actually contributed to the "legal blurring" between Articles 77 and 78.<sup>36</sup> In 1991, the Court of Appeals was confronted with a case requiring a construction of the statutory framework to determine the parameters of the authority of a conservator. The question presented to the tribunal was whether a conservator could authorize the placement of his ward in a nursing home. In *In re Grinker*,<sup>37</sup> the Court of Appeals determined that such power could be granted only pursuant to the committee statute. The *Grinker* decision "settled the debate" surrounding the authority of a conservator to make personal needs decisions.<sup>38</sup> However, the *Grinker* holding also "dramatized the very difficulty the courts were trying to resolve, namely, choosing between a remedy which governs property and finances or a remedy which judges a person completely incompetent."<sup>39</sup>

To resolve the difficulties inherent in the conservator-committee dichotomy, the New York State Law Revision Commission proposed the enactment of Article 81 as a single remedial statute with a standard for appointment dependent upon necessity and the identification of functional limitations.<sup>40</sup> The new statute rejected plenary adjudications of incompetence in favor of a procedure for the appointment of a guardian whose powers are specifically tailored to the needs of the individual. Going forward, the right to counsel would be guaranteed<sup>41</sup> and monitoring of guardianships would be required.<sup>42</sup> The objective of the proceeding as declared by the legislature was to arrive at the "least restrictive form of intervention" to meet the needs of the person while, at the same time, permitting the person to exercise the independence and self-determination of which he or she is capable.<sup>43</sup>

Still, Article 81 may be "more progressive on paper than . . . in practice."<sup>44</sup> As stated by scholar and former jurist Kristin Booth Glen:

[G]uardianship cases are generally only a small portion of the mix of cases carried by individual Supreme Court Justices but if done right can be extremely time consuming. The combination of an over-burdened judicial system, petitioners who routinely request plenary authority, inadequate resources for independent evaluation, and the likelihood that the [alleged incapacitated person] AIP will be unrepresented, result in far too little of the "tailoring" to specifically proven functional incapacities that is the heart of the statute.<sup>45</sup>



In addition, as noted by Glen, where the person alleged to be incapacitated suffers, or appears to suffer, from a progressive dementia, “petitioners will request – and courts often grant – full plenary powers to avoid the necessity of repeated future hearings as the individual’s capacity (inevitably) deteriorates.”<sup>46</sup> Protection of individual liberty, however, should not yield to arguments regarding expense of the proceeding or the convenience of parties other than the person alleged to be incapacitated.<sup>47</sup> While Article 81 is deemed a model statute in many respects, the statute in application is not without critics. From a civil rights perspective, potential areas ripe for reform abound and include improvement of guardian monitoring in New York, promoting alternatives to guardianship and establishing diversion programs.<sup>48</sup>

dents, then respondents can be unjustly deprived of their right to autonomy.<sup>55</sup>

Given the many substantive and procedural variations between Article 17-A and Article 81, the Governor’s *Olmstead* Cabinet<sup>56</sup> and commentators have called for reform or “modernization” of Article 17-A.<sup>57</sup> Surrogate’s Courts are bringing enhanced scrutiny to Article 17-A adjudications and dismissing petitions where guardianship is not the least restrictive form of intervention.<sup>58</sup> Further, a lawsuit was commenced on September 26, 2016 in the U.S. District Court for the Southern District of New York by Disability Rights New York<sup>59</sup> seeking to enjoin the appointment of guardians pursuant to Article 17-A.<sup>60</sup> While the lawsuit was subsequently dismissed on *Younger* abstention grounds, the complaint alleged that Article 17-A violates

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#### Article 17-A of the Surrogate’s Court Procedure Act

Under Article 17-A, the basis for appointing a guardian is whether the person has a qualifying diagnosis of an intellectual or other developmental disability.<sup>49</sup> Current law permits the appointment of a guardian upon proof establishing to the “satisfaction of the court” that a person is intellectually or developmentally disabled and that his or her best interests would be promoted by the appointment.<sup>50</sup> As a jurisdictional prerequisite, a 17-A petition must be accompanied by certifications of two physicians or a physician or a psychologist that the respondent meets the diagnostic criteria of an intellectual or other developmental disability.<sup>51</sup> On its face, Article 17-A provides only for the appointment of a plenary guardian and does not expressly authorize or require the surrogate to dispose of the proceeding in a manner that is least restrictive of the individual’s rights. Indeed, Article 17-A does not even require the court to find that the appointment of a guardian is necessary, does not guarantee the right to counsel and permits the proceeding to be disposed without a hearing at the discretion of the court.<sup>52</sup> That said, Article 17-A has been revered by families because of its relative ease in commencing the proceeding, often without the assistance of counsel.<sup>53</sup> In contrast, Article 81 proceedings can be very complex and expensive to prosecute.<sup>54</sup> The convenience of Article 17-A proceedings as compared to Article 81 proceedings causes tension in New York. As aptly stated by Patricia Wright:

If guardianship is made too expensive, incapacitated people who need the protection and assistance of a guardianship may not have those needs met. However, if guardianship fails to protect the rights of respon-

the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution, the ADA and § 504 of the Rehabilitation Act.<sup>61</sup> The federal court’s decision to abstain does not prejudice the right of the plaintiffs to challenge the statute in state court.

#### Restoration

Not enough study has been undertaken regarding the restoration of rights of people subject to guardianship.<sup>62</sup> Nonetheless, a goal of an effective guardianship regime should be to restore the rights of individuals who are capable of making their own decisions individually or with the assistance of others. Article 81 expressly authorizes modification or termination of the guardianship when, among other things, the incapacitated person has become able to exercise some or all of the powers which the guardian is authorized to exercise.<sup>63</sup> Parallel remedies are available to Article 17-A respondents, as Surrogate’s Court retains jurisdiction over the proceeding and may consider applications to modify or terminate a guardianship.<sup>64</sup> For example, in *In re Guglielmo*,<sup>65</sup> Surrogate’s Court previously appointed a 17-A guardian for a respondent who suffered a traumatic brain injury and was in a coma or semi-comatose state for approximately nine months. At the time the 17-A proceeding was commenced, the respondent was dependent upon others for assistance in many activities of daily living. Fifteen years later, he sought to restore his civil rights. The respondent’s condition had substantially improved from the time of the accident resulting in his brain injury and three years, in fact, had elapsed since he had been in contact with his guardian. Termination of the guardianship was also sup-

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ported by the certifications of both a neuropsychologist and a neurologist who opined that the injuries suffered by the respondent did not currently render him incapable of handling his own medical or financial affairs. After hearing from the respondent, who testified at a hearing regarding his abilities and persuasive evidence of capacity, the court determined that the guardianship should be terminated.

In an unreported case, the MHLS assisted an Article 17-A respondent in modifying and then terminating a guardianship that had been purportedly imposed upon the respondent's consent when the guardian (a family friend) would not support the respondent's desire to marry after the respondent became pregnant. The respondent had a mild intellectual disability and had been deemed capable of making an array of decisions concerning her treatment and desire to engage in an intimate relationship. Despite the respondent's capabilities, her Article 17-A guardian would not advocate for the respondent's preferences and desires and instead substituted her own judgment for that of respondent. The guardian went so far as to declare her intention to have the respondent's child removed from the respondent's custody upon birth so that the guardian could establish custody and raise the child. Further, because the respondent was subject to a guardianship, her obstetrician would not accept the respondent's own consent for prenatal care and was prepared to accept the guardian's direction that the respondent receive an intrauterine device (IUD) following delivery of her child. The respondent was willing to accept a different form of birth control, but was opposed to an IUD.

The MHLS identified an OPWDD-certified program where the respondent could reside with her child and her child's father, who also had an intellectual disability, but the guardian would not consent or agree to the placement. When multiple attempts to resolve the respondent's differences with her guardian failed, the MHLS assisted the respondent in filing a petition in Surrogate's Court under the authority of SCPA 1755 and 1759 to terminate the guardianship. Relief was granted in stages with the respondent's mother being appointed as temporary guardian up and until the birth of the child and then the guardianship was thereafter terminated.

In another unreported case, the MHLS assisted a then 67-year-old woman with mild intellectual disability in removing her 17-A guardian, preventing the appointment of a successor guardian – the guardian's daughter – and dissolving the guardianship. The woman's guardian of 30 years, a distant cousin, had never visited her, had called once in those 30 years and only spoke to care providers when inquiries were made because the guardian failed to return documents presented for her signature. The proposed successor guardian had never met the person subject to guardianship. The woman was, in fact, very capable of making her own decisions. She read books, provided

her own consent for medication treatment, and exercised her right to vote. As a resident of a state-licensed family care home, the woman consistently maintained that she did not want a guardian and did not know the proposed successor guardian. As counsel, the MHLS argued against the guardianship based on the woman's capacity and because both the guardian and the proposed successor guardian displayed a complete lack of involvement or interest in the woman's life. After multiple reports to the court, which included two medical opinions stating that the woman did not require a guardian, several objections to withdrawing the petition by petitioner's counsel, and repeated adjournments, petitioner's counsel finally consented to a conference, the withdrawal of his application for the appointment of the successor guardian and the termination of the guardianship.<sup>66</sup>

Restoration efforts in New York may experience a revival as a result of the Supported Decision-Making pilot program funded by the Developmental Disabilities Planning Council. A component of the pilot is to refer people to Disability Rights New York for restoration of rights. As illustrated by the case examples above, the MHLS will also assist individuals subject to both Article 81 and Article 17-A guardianships to petition for modification or termination of guardianship in appropriate cases consistent with the MHLS's enabling regulations.<sup>67</sup>

### **Proposals for Legislative Reform**

During the 2017 legislative session, several bills were introduced to reform Article 17-A, but none of them passed.<sup>68</sup> There are differences among the various proposals. However, in all of the reform measures advanced, Article 17-A would survive as a discrete statute designed for people with developmental disabilities. Common to the various bills are provisions guaranteeing that a guardian will only be appointed where the respondent exhibits significant impairments in specific enumerated domains of intellectual functioning and/or adaptive behavior. Thus, the proposed chapter amendments promote and require an inquiry by the court into the person's actual abilities before a guardian is appointed.

Additionally, as conceived, the reform measures require that petitioners affirmatively plead that alternatives to guardianship were considered, and identify them. Alternatives may include advance directives, service coordination and other shared or supported decision-making models. The reasons for the declination of alternatives to guardianship must also be pleaded. New formulations of Article 17-A would also include the right of all respondents to a hearing and representation by counsel of the respondent's own choosing, the Mental Hygiene Legal Service, or other court-appointed counsel. Ultimately, the vision behind statutory reform is a reduction in guardianship filings and promotion of alternatives to guardianship.

## Conclusion

Guardianship law is evolving internationally, nationally and in New York State. For judges and the practicing bar, the time has come to reexamine and apply the fundamental principle that guardianship should be considered only after lesser restrictive alternatives, such as supported decision-making, have proven ineffective or are unavailable. Further, if guardianship is found to be necessary and is imposed upon any person, an essential goal of that guardianship should be retention and eventual restoration of individual rights if at all possible. The time has come for the plenary guardianship of unlimited duration to be relegated to history in recognition of the right of people with disabilities to participate in society on an equal basis with all others. ■

1. See *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125 (1914).
2. See, e.g., N.Y. Mental Hyg. Law (MHL) § 81.19. Despite its significance, “guardianship is among the least-noticed, least discussed institutions in the legal system” (Lawrence Friedman, Joanna Grossman, Chris Guthrie, *Guardians: A Research Note*, 40 Am. J. Leg. His. 146 (1996)).
3. See *In re Cooper* (Joseph G.), 46 Misc. 3d 812 (Sup. Ct., Bronx Co. 2014).
4. See Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship and Beyond*, 44 Colum. Hum. Rts. L. Rev. 93 (2012).
5. *Id.* at 102–06.
6. Uniform Guardianship and Protective Proceedings Act (UGPPA) Art. 1, Definitions § 102 (11) (1997).
7. Cal. Prob. Code § 1801(d); Conn. Gen. Stat. Ann. § 45a-669 *et. seq.*; Idaho Code Ann. § 15-5-301 *et. seq.*; Mich. Comp. Laws Ann. Ch. 330 (Mental Health Code) § 330.1600 *et. seq.*; Ky. Rev. Stat. Ann. § 387.500–800; N.Y. Sur. Ct. Proc. Act (SCPA) 1750–1761.
8. Proposed Resolution and Report, American Bar Association, Commission on Disability Rights, Section of Civil Rights and Social Justice, Section of Real Property, Trust and Estate Law, Commission on Law and Aging, Report to the House of Delegates (2017) (ABA Report) [www.americanbar.org/content/dam/aba/directories/policy/2017\\_am\\_113.docx](http://www.americanbar.org/content/dam/aba/directories/policy/2017_am_113.docx).
9. *Id.* at 2.
10. *Id.* at 2, n. 6, citing, Brenda K. Uekert & Richard Van Duizend, *Adult Guardianships: A “But Guess” National Estimate and the Momentum for Reform in Future Trends in State Courts* (2011); *A Profile of Older Americans 2015* (Administration on Aging, Administration on Community Living U.S. Department of Health and Human Services).
11. Robert Abrams, *The Dementia Crisis*, 89 Jan. N.Y. St. B. J. 8 (2017).
12. 42 U.S.C.A §§ 12101 *et seq.*
13. Guardianship originally grew out of the 14th century English concept of *parens patriae* – the duty of the King, and later the State, to protect those unable to care for themselves. See Jennifer Wright, *Protecting Who from What and Why and How: A Proposal for an Integrative Approach to Adult Proceedings*, 12 Elder L. J. 53 (2004); A. Frank Johns, *Guardianship Folly: The Misgovernment of Parens Patriae and the Forecast of Its Crumbling Linkage to Unprotected Older Americans In the Twenty-First Century – A March of Folly? Or Just a Mask of Virtual Reality?* 27 Stetson L. Rev. 1 (1997).
14. H.R. Doc. No. 100-641, at 4 (1987). Subcomm. on Health and Long-term Care of the House Select Comm. on Aging 100th Cong. Abuses in Guardianship of the Elderly and Infirm: A National Disgrace. Prepared Statement of Chairman Claude Pepper.
15. See Michael Perlin, “Striking for Guardians and Protectors of the Mind:” *The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law*, 117 Penn. St. L. Rev. 1159 (2013).
16. See <http://www.un.org/disabilities/documents/convention/convopt-prot-e.pdf>.
17. Arlene S. Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights*, Routledge (2015).
18. Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. Colo. L. Rev. 157, 161 (2010); Nina Kohn, Jeremy Blumenthal, Amy Campbell, *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 Penn. St. L. Rev. 1111 (2013).
19. ABA report, *supra* note 8 at 5.
20. Tex. Estates Code Ann § 1357 (West 2015).
21. The New York DDPC Funding Announcement solicited proposals for two pilot projects utilizing supported-decision making to divert persons at risk of guardianship and the other to restore the rights of persons subject to guardianship (<http://ddpc.ny.gov/supported-decisionmaking-0>). Other consortium partners are the Arc of Westchester, NYSARCA and Disability Rights New York. Kristin Booth Glen is the SDM-NY project director.
22. MHL § 81.01.
23. Upon its enactment in 1969, parents and parent organizations primarily voiced the need for an abbreviated guardianship proceeding for individuals with mental retardation when they reached the age of 18. See Karen Andreasian, Natalie Chin, Kristin Booth Glen, Beth Haroules, Katherine Hermann, Maria Kuns, Aditi Shah, Naomi Weinstein, *Revisiting S.C.P.A. 17-A: Guardianship for People with Developmental Disabilities*, 18 CUNY L. Rev. 287 (2015).
24. The term “intellectual disability” has replaced the term “mental retardation” and its derivatives in the federal government and most states, including New York (see 2010 N.Y. Laws ch. 168; 2011 N.Y. Laws ch. 37). In 2016, the legislature removed the term “mentally retarded” from Article 17-A and substituted “intellectually disabled” (2016 N.Y. Laws, ch.198).
25. See Bailly & Nick Torak, *Should We Be Talking? Beginning a Dialogue on Guardianship for the Developmentally Disabled in New York*, 75 Albany L. Rev. 807, 818 (2012) (The statute’s emphasis on the continued role of parents is evidenced from several of its features including that Article 17-A is placed in New York’s Consolidated Laws immediately following guardianship of minors, codified at Article 17 of the SCPA.).
26. See, e.g., *Guardianship of Derek*, 12 Misc. 3d 1132 (Sur. Ct., Broome Co. 2006).
27. 1992 N.Y. Laws ch. 698.
28. *Id.*
29. See generally, Bailly & Nick Torak, *supra* note 25 at 817; *In re Fisher*, 147 Misc. 2d 329 (Sup. Ct., N.Y. Co. 1989).
30. *In re Fisher*, 147 Misc. 2d at 332.
31. 1972 N. Y. Laws ch. 251.
32. MHL § 77.01 (repealed 1992 N.Y. Laws ch. 698).
33. *Id.*
34. MHL §§ 77.04 & 78.02 (repealed 1992 N.Y. Laws ch. 698). Section 78.02 provided that “prior to the appointment of a committee under this article, it shall be the duty of the court to consider whether the interests sought to be protected could best be served by the appointment of a conservator.” See *In re Seronde*, 99 Misc. 2d 485 (Sup. Ct., Westchester Co.1979).
35. 1974 N.Y. Laws ch. 623, § 3.
36. Julie M. Solinski, *Guardianship Proceedings in New York: Proposals for Article 81 to Address Both Lack of Funding and Resource Problems*, 17 Pace L. Rev. 445 (1997), citing G. Oliver Koppell & Kenneth J. Munnely, *The New Guardian Statute: Article 81 of the Mental Hygiene Law*, N.Y. St. B. J., Feb. 1993, at 16.
37. *In re Grinker* (Rose), 77 N.Y.2d 703 (1991).
38. Solinski, *supra* note 36 at 450.
39. *Id.*
40. Memorandum of the Law Review Commission Relating to Article 81 of the Mental Hygiene Law Appointment of a Guardian for Personal Needs and/or Property Management, Senate No. 4498, Assembly No. 7343, Leg. Doc. No. 65 [C] (1992).
41. MHL § 81.10; see *In re St. Luke’s Roosevelt Hospital (Marie H.-City of New York)*, 89 N.Y.2d (1996).
42. MHL § 81.30.
43. MHL § 81.01.
44. Kristin Booth Glen, *supra* note 4 at 115, n. 102.

45. *Id.*
46. *Id.*
47. Article 81 proceedings can be expensive, but the cost does not dilute the merit of proceeding in a manner that protects the due process rights of the alleged incapacitated person. See Rose Mary Bailly, Practice Commentaries McKinney's Cons. Laws of N.Y. Book 34A, MHL § 81.01, p. 9, citing Strauss, *Before Guardianship, Abuse of Patient Rights behind Closed Doors*, 41 Emory L. J. 761, 763 (1992).
48. See *Guardianship in New York: Developing an Agenda for Change, Report of the Cardozo School of Law Conference* (2012). The report is available online: <https://www.cardozo.yu.edu/sites/default/files/GuardianshipReport.pdf>.
49. SCPA 1750, 1750-a. An Article 17-A proceeding may also be commenced for a person alleged to have a traumatic brain injury (SCPA 1750-[1]).
50. *Id.*
51. *Id.*; but see *Guardianship of Derek*, *supra* note 26, holding that in a contested 17-A proceeding the physician-patient privilege applies and certificates obtained in violation of the privilege would not be considered by the court.
52. See Bailly & Nick Torak, *supra* note 25 at 821-25.
53. See Andreasian et al., *Revisiting S.C.P.A. 17-A*, *supra* note 23 at 300 (where the authors note that 17-A procedure is relatively simple and can be typically managed by *pro se* petitioners).
54. Bailly, *supra*, note 47.
55. See Jennifer Wright, *supra* note 13 at 62.
56. The Olmstead Cabinet was created following the U.S. Supreme Court decision in *Olmstead v. LC*, 527 U.S. 581 (1999). The Cabinet's mandate is to recommend law and policy changes to ensure that people with disabilities receive services and supports in settings that do not segregate them from the community, <https://www.ny.gov/programs/olmstead-community-integration-every-new-yorker-last>.
57. See Bailly & Nick Torak, *supra* note 25; Andreasian et al., *Revisiting S.C.P.A. 17-A*, *supra* note 23.
58. See *In re D.D.*, 50 Misc. 3d 666 (Sur. Ct., Kings Co. 2015).
59. Disability Rights New York is the Protection and Advocacy Agency in New York State acting pursuant to an enabling statute codified at 42 U.S.C.A. §§ 10802 *et seq.*
60. *Disability Rights New York v. New York State*, 1:16-cv-0733 (AKH) (filed 9/21/16). Complaint is available at <http://www.new.drnry.org/docs/art-17a-lawsuit.pdf>.
61. *Id.*
62. The Florida Developmental Disabilities Council may be a leader among states in this regard. The Council commissioned a research study to examine guardianship restoration among people with disabilities. The report of the Council's findings, Florida Developmental Disabilities Council, Restoration of Capacity Study and Workgroup Report (2014), is available online.
63. MHL § 81.36 (a)(1-4).
64. SCPA 1755, 1759. While there are specific statutory provisions

for modification and termination of an Article 17-A decree, they are lacking due process safeguards. For instance, no hearing is required in a modification proceeding and typically applications are brought only to replace a family member with another as successor guardian. The burden of proof for Article 17-A termination proceedings is not codified and there is no indication of what must be proved for a guardianship to be dissolved (Andreasian et al., *Revisiting S.C.P.A. 17-A*, *supra* note 23 at 316-17).

65. 2006 N.Y. Misc. Lexis 4804; 236 N.Y.L.J. 92 (Sur. Ct., Suffolk Co. 2006).
66. During its investigation, MHLS discovered that there had been a testamentary trust established by the woman's deceased mother. The 17-A guardian was the trustee, and successfully petitioned in 2010, for the appointment of her daughters to replace her as co-trustees. During the 30 years that the trust was in existence, no funds were ever expended for the benefit of the beneficiary. MHLS subsequently successfully petitioned to remove the co-trustees and reform the trust as a supplemental needs trust.
67. N.Y. Comp. Codes R. & Regs. tit. 22, §§ 622.2(b)(5), 694.2(b)(5), 823.2(b)(5), 1023.2(b)(5).
68. See N.Y. Assembly Number 8171 (2017), N.Y. Assembly Number 5840 (2017), N.Y. Senate Number 5842 (2017). See also N.Y. Senate Number 4983 (2015-2016).



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